

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD D. SAGE)	
Claimant)	
VS.)	
)	
GOODYEAR TIRE & RUBBER COMPANY)	Docket No. 1,001,191
Respondent)	
Self-Insured)	

ORDER

Respondent appealed the July 11, 2003 Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board (Board) heard oral argument on January 6, 2004.

APPEARANCES

Steven M. Tilton of Topeka, Kansas, appeared for claimant. John M. Bausch of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award. In addition, in their briefs and during oral argument to the Board, the parties agreed that the ALJ's Award calculation should be changed to provide that the temporary total disability compensation is followed by the permanent disability compensation.¹

¹ The ALJ's Award ordered the payment of the weekly permanent disability compensation to begin on the date of accident. The Board agrees with the parties that the payment of temporary total disability compensation and permanent total or permanent partial disability compensation should not overlap each other.

ISSUES

The sole issue raised for the Board's review is:

1. What is the nature and extent of claimant's disability?

Judge Benedict found claimant "has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment."² Accordingly, Judge Benedict awarded claimant compensation for a permanent total disability.³

Respondent disagrees, contending claimant is instead entitled to an award based upon a work disability (the average of his tasks loss and his wage loss).⁴ Claimant was unable to return to work for respondent and has not worked anywhere since being released from medical care after his surgery. Respondent acknowledges that it did not have a job that claimant could perform within his restrictions. However, respondent further contends that a wage of \$280 per week should be imputed to claimant because he failed to make a good faith job search post-injury and the evidence shows he retains the ability to earn \$7.00 per hour and work a 40-hour work week.⁵

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent almost 40 years. Most of that time was spent as a fork lift operator. On January 26, 2001, claimant was in the course of his regular job duties operating a fork lift when a 75 pound bale of crude rubber fell from the pallet. Claimant stopped to pick it up and felt a pain in his low back.

Since his surgery, claimant has been in constant pain. As a result, his activities are severely limited. His low back and leg pain varies from day-to-day, but on good days claimant is able to do things like mow his lawn, hunt, camp, travel and do automobile maintenance. Nevertheless, claimant is only able to do these activities in a very slow and guarded manner. He is not able to engage in any of these activities as often or to the extent he did prior to this injury. Claimant spends much of his day resting, including sitting and lying down to relieve his pain symptoms. Bending, stooping and twisting bother him in particular. Claimant estimates that the most he can lift is 10 to 20 pounds. He can only tolerate sitting about half-an-hour and standing about ten minutes at a time. Claimant can

² Award (July 11, 2003) at 3.

³ See K.S.A. 44-510c(a).

⁴ See K.S.A. 44-510e(a).

⁵ See *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

walk about 30 minutes. The pain also interferes with his sleep which, in turn, causes him to tire easily. Claimant tries to take naps during the day. Claimant has much less energy and endurance than what he had before his accident, although some of this may be attributable to his heart condition that developed post-injury.

Claimant says he likes to work and would like to return to work if he could handle it. He has not looked for work anywhere since leaving Goodyear because he does not know of any work he could perform on a regular basis. Claimant has a limited education and few, if any, transferable skills. He has trouble reading and writing. The fact that he can no longer work and do things like he used to depresses him. He misses work "very much."⁶

Andrea Sage, claimant's wife, also testified concerning the effects this injury has had on claimant.

Q. (Mr. Tilton) And what effect has this injury had on him that you've observed?

A. (Andrea Sage) It has altered almost every part of his life and the tasks that he attempts to complete. He has to find a new way of doing things that don't involve bending and stooping.⁷

. . . .

Q. (Mr. Tilton) From your observation, what is the most you've seen him lift since the accident?

A. (Andrea Sage) Approximately ten pounds. He doesn't lift hardly anything. We do more scooting and using apparatuses to help us move things that - - that before he would have just taken in his hands.⁸

She described how claimant sits on a stool to wash the car to avoid bending or stooping. She corroborated claimant's testimony about the pain and discomfort he experiences and how he has had to severely limit his activities. She also described how her husband tires easily and frequently must sit or lie down to rest. She acknowledged he has trouble sleeping at night. She also pointed out that because of her husband's

⁶ R.H. Trans. at 21.

⁷ Sage Depo. at 4.

⁸ *Id.* at 5 and 6.

difficulties with reading and writing, she must go with him to the doctors' offices and other appointments so she can help with any forms to be read or filled out.

Truett W. Swaim, M.D., is a board certified orthopedic surgeon. He examined claimant at the request of his attorney on February 7, 2002. Dr. Swaim noted claimant's surgery included a multi-level bone graft fusion stabilized with pedicle screws and fixation plates. Dr. Swaim described the loss of fusion mass as shown by a series of x-rays which means the fusion did not take. This increases the likelihood of claimant requiring another surgery in the future.

Dr. Swaim diagnosed claimant with "failed back syndrome with ongoing significant back pain, with limitation of motion of the back and it appears he has had failure of the posterolateral fusion as demonstrated by the progressive loss of fusion mass seen by the x-rays." ⁹ Using the range of motion model in the *Guides*¹⁰ he calculated claimant's permanent functional impairment as 29 percent. Based upon the task list prepared by Mr. Santner, Dr. Swaim believed claimant had a 100 percent task loss. Dr. Swaim stated claimant's work capacity as:

Mr. Sage is significantly limited in terms of his work capacity. He is limited to a sedentary work level according to the U.S. Department of Labor Dictionary of Occupational Titles with the ability to exert up to 10 pounds of force occasionally, and/or a negligible amount of force frequently or continuously. He needs to avoid bending, stooping, twisting, climbing, crawling and squatting. He does need to change positions every 15 to 20 minutes. Considering his limitations, it does not appear that Mr. Sage would be employable in the job market. ¹¹

Philip L. Baker, M.D., is a board certified orthopedic surgeon. At respondent's request he performed an independent medical examination of claimant on May 14 and May

⁹ Swaim Depo. Ex. 1 at 8.

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.).

¹¹ Swaim Depo. Ex. 1 at 8 and 9.

22, 2002. Dr. Baker noted claimant had a spinal fusion from L4 to the sacrum with hardware. On examination claimant had limitations of range of motion and diminished sensation in both lower extremities. Dr. Baker found claimant to have a 20 percent impairment of function utilizing the diagnosis related model of the *Guides* and a 16 percent impairment using the range of motion model. Dr. Baker imposed restrictions of occasional lifting not more than 10 to 20 pounds. Dr. Baker believed claimant to be unable to return to his former employment with respondent but considered him capable of performing some type of substantial and gainful employment. Dr. Baker did not identify any specific jobs he considered claimant capable of performing.

John D. Ebeling, M.D., who is a neurosurgeon, examined claimant on July 16, 2002 at the request of the ALJ. He noted claimant underwent L4-5 and L5-S1 discectomies with L4-S1 inter[-]transverse fusion with pedicle screws. Dr. Ebeling agreed with Dr. Swaim that claimant's fusion was incomplete but did not think claimant required another surgical intervention at this time. He provided no rating nor any recommendations concerning restrictions.

I think he will likely continue to have limiting back pain and some leg discomfort. I would not recommend any further surgical options at this time or injections. He will require some treatment with pain medications and/or anti-inflammatories and physical therapy from time to time. If his situation were to worsen, then I think repeat lumbar spine x-rays would need to be done to be sure there is no loosening or breakage of the instrumentation. If his situation were to worsen or there were signs that the instrumentation were causing a problem or broke, then he might require surgery to remove these pedicle screws and bars. Similarly, if he were to have a change in his status, he might need repeat studies of either myelogram/CT scan or MRI scan. As his fusion is not complete, I think there is a possibility that he may well require investigation and intervention in the future.¹²

Dick Santer is a vocational rehabilitation counselor who testified on behalf of claimant. In formulating his opinions, Mr. Santner took into consideration the medical restrictions given by Drs. Swaim and Baker. In Mr. Santner's opinion, considering the medical restrictions, together with claimant's work history, age, education and experience, claimant could not be placed in a full time job. Mr. Santner identified some jobs that claimant might possibly do on a part time basis, including fast food delivery, but it was questionable whether even those could be performed within claimant's restrictions.

In my opinion, Mr. Sage has absolutely no transferable job skills in the sense that the most sedentary activity he did in the past was actually operate a sit down type forklift. By Dr. Baker's written restrictions, it would appear that Mr. Sage might be able to perform that activity, although it would seem Dr. Smith and Dr. Swaim would advise against it, in that he would need to do that activity for 2 to 3 hours at a time

¹² *Id.* at 2.

uninterrupted. Given the recommendations to change positions with the frequency mentioned, along with the commentary made on daily pain levels Mr. Sage experiences, I would seriously doubt he is employable at this time. If he were, he might be able to handle a part-time position such as fast food delivery, and where he would have the opportunity to be in and out of a vehicle, and able to alternate walking, sitting and standing. A position of that nature in Topeka is going to pay approximately \$7.00 per hour. Given Mr. Sage's background and work history, this is one of the only positions I can think of at this time.¹³

The Board finds claimant is essentially and realistically unemployable.¹⁴

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated July 11, 2003 should be modified as to the calculation and payment of benefits, but is otherwise affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, and against the respondent, Goodyear Tire and Rubber Company for an accidental injury which occurred January 26, 2001, and based upon an average weekly wage of \$1,203.19 for 38 weeks of temporary total disability compensation at the rate of \$401 per week or \$15,238.00 followed by approximately 273.72 weeks of permanent total disability compensation at the rate of \$401 per week or \$109,762.00, for a permanent total disability, making a total award not to exceed \$125,000.

As of January 9, 2004, there is due and owing claimant 38 weeks of temporary total disability compensation at the rate of \$401 per week or \$15,238.00, followed by 116.14 weeks of permanent total disability compensation at the rate of \$401 per week in the sum of \$46,572.14 for a total of \$61,810.14, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$63,189.86 is to be paid for 275.86 weeks at the rate of \$401 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of January 2004.

¹³ Santner Depo. Ex. 2.

¹⁴ See *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

BOARD MEMBER

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c: Steven M. Tilton, Attorney for Claimant
John M. Bausch, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director